

## Message Text

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TO AMEMBASSY HELSINKI IMMEDIATE

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UNCLAS STATE 236327

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TAGS: PFOR, UN, CB, FI

SUBJECT: LEGAL IMPLICATIONS OF KHMER REPRESENTATION  
QUESTION

REF: HELSINKI 2958 (NOTAL)

FOLLOWING PER YOUR REQUEST IS BRIEF ON LEGAL PRINCIPLES  
INVOLVED IN KHMER ISSUE. YOU MAY AT YOUR DISCRETION SUB-  
MIT BRIEF TO GOF AS LEGAL BASIS OUR STRONG OPPOSITION  
TO PRO-SIHANOUK RESOLUTION. YOU SHOULD, HOWEVER, FOCUS  
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FURTHER EFFORTS ON OBTAINING GOF SUPPORT FOR DEFERMENT  
PER STATE 236134.

MEMORANDUM: LEGAL IMPLICATIONS OF KHMER REPRESENTATION

QUESTION.

A RESOLUTION NOW BEFORE THE UNITED NATIONS GENERAL ASSEMBLY WOULD HAVE THE EFFECT OF GIVING THE SEAT NOW HELD BY THE GOVERNMENT OF THE KHMER REPUBLIC TO THE PURPORTED GOVERNMENT OF WHICH PRINCE NORODOM SIHANOUK IS OSTENSIBLY THE HEAD. THIS PROPOSAL RAISES SERIOUS QUESTIONS UNDER THE UNITED NATIONS CHARTER AND, IF ACCEPTED, COULD CONSTITUTE A VERY DAMAGING PRECEDENT OF INTERFERENCE BY THE ORGANIZATION IN THE INTERNAL AFFAIRS OF A STATE.

I. ONLY STATES ARE ENTITLED TO MEMBERSHIP IN THE UNITED NATIONS, AND A MEMBER STATE MAY BE REPRESENTED ONLY BY THE GOVERNMENT EXERCISING EFFECTIVE AUTHORITY IN THAT STATE.

ARTICLE 4, PARAGRAPH 1 OF THE CHARTER PROVIDES AS FOLLOWS:

MEMBERSHIP IN THE UNITED NATIONS IS OPEN TO ALL OTHER PEACE-LOVING STATES WHICH ACCEPT THE OBLIGATIONS CONTAINED IN THE PRESENT CHARTER, AND, IN THE JUDGMENT OF THE ORGANIZATION, ARE ABLE AND WILLING TO CARRY OUT THESE OBLIGATIONS.

THIS ARTICLE ESTABLISHES NOT ONLY THE PRINCIPLE THAT MEMBERSHIP IN THE UNITED NATIONS IS OPEN ONLY TO STATES, BUT ALSO THE CRUCIAL REQUIREMENT OF ABILITY AND WILLINGNESS TO CARRY OUT THE OBLIGATIONS CONTAINED IN THE CHARTER. THE IMPORTANCE OF THIS POINT WAS EMPHASIZED IN A MEMORANDUM PUBLISHED IN 1950 BY THE SECRETARY-GENERAL OF THE UNITED NATIONS, WHICH STATED IN PART AS FOLLOWS:

... IT IS QUITE POSSIBLE THAT A SITUATION (INVOLVING TWO RIVAL GOVERNMENTS) WILL OCCUR AGAIN IN THE FUTURE  
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AND IT IS HIGHLY DESIRABLE TO SEE WHAT PRINCIPLES CAN BE FOLLOWED IN CHOOSING BETWEEN THE RIVALS....

IT IS SUBMITTED THAT THE PROPER PRINCIPLE CAN BE DERIVED BY ANALOGY FROM ARTICLE 4 OF THE CHARTER. THIS ARTICLE REQUIRES THAT AN APPLICANT FOR MEMBERSHIP MUST BE ABLE AND WILLING TO CARRY OUT THE OBLIGATIONS OF MEMBERSHIP. THE OBLIGATIONS OF MEMBERSHIP CAN BE CARRIED OUT ONLY BY GOVERNMENTS WHICH IN FACT POSSESS THE POWER TO DO SO. WHERE A REVOLUTIONARY GOVERNMENT PRESENTS ITSELF AS REPRESENTING A STATE, IN RIVALRY TO AN EXISTING GOVERNMENT, THE QUESTION AT ISSUE SHOULD BE WHICH OF THESE TWO GOVERNMENTS IN FACT IS IN A POSITION TO EMPLOY THE RESOURCES AND DIRECT THE PEOPLE

OF THE STATE IN FULFILLMENT OF THE OBLIGATIONS OF MEMBERSHIP. IN ESSENCE, THIS MEANS AN INQUIRY AS TO WHETHER THE NEW GOVERNMENT EXERCISES EFFECTIVE AUTHORITY WITHIN THE TERRITORY OF THE STATE AND IS HABITUALLY OBEYED BY THE BULK OF THE POPULATION.

(S/1466, U.N. SECURITY COUNCIL OFF. REC. SUPP. 1, 1 JANUARY THROUGH 31 MAY 1950; AT 22-23; REPRINTED AT 13 WHITEMAN, DIGEST OF INTERNATIONAL LAW 253 (1968).

THE MEMORANDUM PREPARED FOR THE SECRETARY-GENERAL TOOK THE POSITION THAT THE ACTION OF THE ORGANIZATION ON THE QUESTION OF REPRESENTATION WOULD NOT NECESSARILY BE TIED TO OR AFFECT THE POLICIES OF MEMBER STATES REGARDING RECOGNITION OF THE GOVERNMENT IN QUESTION. IF THE FOREGOING CRITERIA WERE MET, THE MEMORANDUM STATED,

... IT WOULD SEEM APPROPRIATE FOR THE UNITED NATIONS ORGANS, THROUGH THEIR COLLECTIVE ACTION, TO ACCORD IT THE RIGHT TO REPRESENT THE STATE IN THE ORGANIZATION, EVEN THOUGH INDIVIDUAL MEMBERS OF THE ORGANIZATION REFUSE, AND MAY CONTINUE TO REFUSE, TO ACCORD IT RECOGNITION AS THE LAWFUL GOVERNMENT FOR REASONS WHICH ARE VALID UNDER THEIR NATIONAL POLICIES (IBID).

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THE QUESTION, THEREFORE, IS NOT ONE OF RECOGNITION, WHICH MAY INVOLVE A VARIETY OF POLITICAL AND OTHER SUBJECTIVE FACTORS, BUT RATHER ONE OF THE OBJECTIVE REALITIES OF EFFECTIVE AUTHORITY AND ABILITY TO FULFILL THE OBLIGATIONS OF THE CHARTER ON BEHALF OF THE MEMBER STATE.

II. THE GOVERNMENT OF THE KHMER REPUBLIC FULFILLS THE FOREGOING CRITERIA; THE SIHANOUK "GOVERNMENT" CLEARLY DOES NOT.

THE GOVERNMENT OF THE KHMER REPUBLIC HAS NEVER CEASED TO MAINTAIN ITS CLEAR CONTROL OF THE MACHINERY OF GOVERNMENT, OF THE GREAT MAJORITY OF THE POPULATION, AND OF THE CRUCIAL URBAN AREAS AND TERRITORIES IN WHICH THE GREATEST PORTION OF THE ECONOMIC, SOCIAL AND POLITICAL LIFE OF THE CAMBODIAN PEOPLE TAKES PLACE. IT IS THUS IN A POSITION TO "COMMAND THE RESOURCES AND DIRECT THE PEOPLE" OF THE STATE AND CONSEQUENTLY TO CARRY OUT THE OBLIGATIONS OF CAMBODIA UNDER THE UNITED NATIONS CHARTER.

IT IS TRUE THAT INSURGENT FORCES HAVE DISRUPTED GOVERNMENT CONTROL, IN THE MILITARY SENSE, OF SOME PARTS OF THE TERRITORY OF CAMBODIA. HOWEVER, THE TERRITORY IN QUESTION IS PRIMARILY RURAL IN CHARACTER. THE AREAS OF CENTRAL IMPORTANCE TO THE MAIN FUNCTIONS OF GOVERNMENT

AND THE SOCIAL PATTERNS OF CAMBODIAN LIFE, AS WELL AS THE MAJOR MARKETS AND PORTS, ARE CLEARLY UNDER FULL GOVERNMENT CONTROL. IT SHOULD ALSO BE NOTED THAT EVEN IN THOSE AREAS UNDER THE MILITARY CONTROL OF INSURGENT FORCES, A PART OF THE POPULATION RETAINS ITS ALLEGIANCE TO THE GOVERNMENT OF THE KHMER REPUBLIC. THIS IS MANIFESTED BY THE FACT THAT THE THOUSANDS OF REFUGEES WHO

FLEE THE FIGHTING IN CONTESTED ZONES GO ONLY TO TERRITORIES IN WHICH THE GOVERNMENT HAS CLEAR MILITARY CONTROL.

MOREOVER, THE FACT GOVERNMENT CONTROL OF CERTAIN PARTS OF THE TERRITORY OF CAMBODIA HAS BEEN INTERRUPTED BY INSURGENT FORCES HAS NO NECESSARY RELATIONSHIP TO THE QUESTION OF THE DEGREE OF EFFECTIVE AUTHORITY EXERCISED BY THE SIHANOUK "GOVERNMENT". THAT ENTITY, WHICH HAS UNCLASSIFIED

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LONG HAD ITS BASE IN A FOREIGN CAPITAL FAR DISTANT FROM THE TERRITORY OF CAMBODIA, HAS NOT EVEN DEMONSTRATED ITS CONTROL OVER THE INSURGENT FORCES OPERATING IN CAMBODIA. NOR IS THERE ANY INDICATION THAT THAT ENTITY CONTROLS ANY SORT OF ADMINISTRATIVE MACHINERY WHICH MIGHT EXERCISE GOVERNMENTAL AUTHORITY IN TERRITORY UNDER THE MILITARY CONTROL OF INSURGENT FORCES. THUS, THERE HAS NOT BEEN THE SLIGHTEST SHOWING THAT THE SIHANOUK "GOVERNMENT" EITHER HAS "EFFECTIVE AUTHORITY WITHIN THE TERRITORY OF THE STATE" OR "IS HABITUALLY OBEYED BY THE BULK OF THE POPULATION."

III. UNDER THESE CIRCUMSTANCES, ACCEPTANCE OF THE SIHANOUK "GOVERNMENT" AS THE REPRESENTATIVE OF CAMBODIA IN THE UNITED NATIONS WOULD CONSTITUTE A DANGEROUS PRECEDENT WHICH WOULD CONFLICT WITH IMPORTANT CHARTER PRINCIPLES AND COULD ONLY WEAKEN THE ORGANIZATION.

THE ONLY GUIDELINES WHICH HAVE EVER BEEN LAID DOWN BY THE GENERAL ASSEMBLY FOR DEALING WITH REPRESENTATION QUESTIONS IN CASES OF THIS TYPE ARE CONTAINED IN GENERAL ASSEMBLY RESOLUTION 396 (V), IN WHICH THE ASSEMBLY:

RECOMMEND(ED) THAT, WHENEVER, MORE THAN ONE AUTHORITY CLAIMS TO REPRESENT A MEMBER STATE IN THE UNITED NATIONS AND THIS QUESTION BECOMES THE SUBJECT OF CONTROVERSY IN THE UNITED NATIONS, THE QUESTION SHOULD BE CONSIDERED IN THE LIGHT OF THE PURPOSES PRINCIPLES OF THE CHARTER AND THE CIRCUMSTANCES OF EACH CASE;...

ARTICLE 2 OF THE CHARTER SETS FORTH THE BASIC PRINCIPLES OF THE ORGANIZATION. TWO OF THOSE PRINCIPLES ARE OF PARTICULAR RELEVANCE HERE. ARTICLE 2(2) PROVIDES THAT:

ALL MEMBERS, IN ORDER TO ENSURE TO ALL OF THEM THE RIGHTS AND BENEFITS RESULTING FROM MEMBERSHIP, SHALL FULFILL IN GOOD FAITH THE OBLIGATIONS ASSUMED BY THEM IN ACCORDANCE WITH THE PRESENT CHARTER.

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THE OBJECTIVES OF THIS PRINCIPLE WOULD OBVIOUSLY BE DEFEATED IF MEMBERS WERE TO BE REPRESENTED BY ENTITIES NOT IN A POSITION TO ENSURE FULFILLMENT OF CHARTER OBLIGATIONS BY THAT MEMBER. ARTICLES 4(1) AND 2(2) ARE MUTUALLY REINFORCING IN THIS CONTEXT. JUST AS THE SEATING OF THE SIHANOUK "GOVERNMENT" WOULD BE INCONSISTENT WITH THE INTENT OF ARTICLE 4(1), SO ALSO WOULD IT CONFLICT WITH THE BASIC CHARTER PRINCIPLE CONTAINED IN ARTICLE 2(2). FOR THE ORGANIZATION TO ACCEPT AS REPRESENTATIVES OF MEMBERS ENTITIES NOT IN A POSITION TO MEET CHARTER OBLIGATIONS TO OTHERS COULD ONLY WEAKEN THE CHARTER BY GIVING IT THE CHARACTER OF A "PAPER" COMMITMENT.

IN ADDITION, ARTICLE 2(7) OF THE CHARTER PROVIDES IN PART THAT:

NOTHING CONTAINED IN THE PRESENT CHARTER SHALL AUTHORIZE THE UNITED NATIONS TO INTERVENE IN MATTERS WHICH ARE ESSENTIALLY WITHIN THE DOMESTIC JURISDICTION OF ANY STATE....

THIS PROVISION SETS FORTH IN LEGAL TERMINOLOGY THE BASIC PRINCIPLE OF NON-INTERFERENCE IN THE INTERNAL AFFAIRS OF A STATE, A PRINCIPLE OF CRUCIAL IMPORTANCE TO THE CONTINUED VITALITY OF THE ORGANIZATION. NOTHING COULD BE MORE INCONSISTENT WITH THIS PRINCIPLE THAN AN EFFORT BY MEMBERS OF THE ORGANIZATION TO INFLUENCE THE OUTCOME OF A STRUGGLE FOR CIVIL CONTROL OF A MEMBER STATE THROUGH DECISIONS AS TO WHO REPRESENTS THAT MEMBER STATE. FOR THE ORGANIZATION TO BE USED IN THIS WAY WOULD CREATE A VERY SERIOUS PRECEDENT OF INVOLVEMENT IN THE INTERNAL AFFAIRS OF A MEMBER STATE FOR POLITICAL REASONS. THE ONLY WAY TO AVOID THIS VERY DANGEROUS PATH IS FOR THE ORGANIZATION TO ADHERE IN ITS DECISIONS ON REPRESENTATION QUESTIONS TO THE OBJECTIVE CRITERIA OF EFFECTIVE AUTHORITY SET FORTH ABOVE. FOR THE ORGANIZATION TO SEAT, IN PLACE OF AN ESTABLISHED GOVERNMENT, A PAPER "GOVERNMENT" WHICH HAS ITS BASE OUTSIDE THE TERRITORY OF THE MEMBER STATE IT PURPORTS TO REPRESENT, AND WHICH HAS MADE NO SHOWING OF EFFECTIVE AUTHORITY OVER THE POPULATION OR CONTROL OF ANY SORT OF GOVERNMENT MACHINERY,

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WOULD BE A CLEAR AND DANGEROUS DEPARTURE FROM THE OBJECTIVE STANDARDS TO WHICH THE ORGANIZATION MUST ADHERE IF IT IS TO AVOID BEING DRAWN INTO EVERY SITUATION OF INTERNAL CIVIL STRIFE IN WHICH OTHER MEMBER STATES CHOOSE TO TAKE AN INTEREST. KISSINGER

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